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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

V1300CR201080049

STATE'S RESPONSE TO DEFENDANT'S  
SUPPLEMENT TO MOTION FOR  
RECONSIDERATION OF ORAL RULING  
TO ADMIT EVIDENCE OF PRIOR SWEAT  
LODGE CEREMONIES

(The Honorable Warren Darrow)

The State of Arizona, through undersigned counsel, respectfully files this response to Defendant's Supplement to Motion for Reconsideration of Oral Ruling to Admit Evidence of Prior Sweat Lodge Ceremonies. This response is limited to Defendant's argument relating to Dr. Mosley's opinion about the relevancy of prior sweat lodge ceremonies as expressed in his interview of April 18, 2011. During the pretrial session this morning, this Court indicated it wanted to address this issue quickly. The State will file a supplemental response addressing the other issues raised in Defendant's pleadings filed yesterday in the time permitted under Rule 35, Ariz. R. Crim. P. This response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Law:

Rule 401 of the Arizona Rules of Evidence defines "relevant evidence" as evidence "having

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1 **any** tendency to make the existence of **any** fact that is of consequence . . . more probable or less  
2 probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071  
3 (1988). (*emphasis added*). This standard of relevance is not particularly high. *Id.* Rule 402 provides  
4 that all relevant evidence is admissible unless that evidence is excludable on some other grounds.  
5 Pursuant to Rule 403, some relevant evidence "may be excluded if its probative value is  
6 **substantially** outweighed by the danger of **unfair** prejudice, confusion of the issues, or misleading  
7 the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative  
8 evidence." (*emphasis added*).

10 "Our constitution preserves the 'right to have the jury pass upon questions of fact by  
11 determining the credibility of witnesses and the weight of conflicting evidence.'" *Logerquist v.*  
12 *McVey*, 196 Ariz. 470, 487, 1P.3d 113, 130 (2000) (quoting *Burton v. Valentine*, 60 Ariz. 518, 529,  
13 141 P.2d 847, 851 (1943). While admissibility is a determination for the judge, weight and  
14 credibility are for "determination of the jury unassisted by the judge." *State v. Lehr*, 201 Ariz. 509,  
15 517, 38 P.3d 1172, 1180 (2002) (quoting *State v. Sanchez*, 328 N.C. 247, 400 S.E.2d 421, 424  
16 (1991).

18 **Argument:**

19 **I. Dr. Mosley's opinion lacks any foundation and is not reliable given the context in**  
20 **which it was asked.**

21  
22 The April 18, 2011, interview of Dr. Mosley was almost an hour in length. The excerpt of  
23 the interview in the transcript attached to Defendant's motion reflects nearly (if not all of) the  
24 **entire** interview as it related to any discussion of prior sweat lodge events. The purpose of the  
25 interview was to allow the Defendant to interview Dr. Mosley regarding additional items the State  
26 had sent to him for his review. It was only after Dr. Mosley indicated he **had not** reviewed Mr.

1 Pfankuch's medical records, that the doctor was presented with the extremely narrow questions  
2 posed by Ms. Do. What was totally omitted from the interview with Dr. Mosley was any  
3 presentation of the evidence already admitted at trial (and evidence yet to be admitted) relating to  
4 the prior sweat lodges conducted by defendant and others at Angel Valley, the lack of any  
5 evidence that organophosphates were ever used at Angel Valley, and the medical issues observed  
6 in defendant's participants from prior years.<sup>1</sup> Specifically, Dr. Mosley was not told that trial  
7 testimony indicated the following:  
8

- 9 • After the 2007 sweat lodge ceremony, participants observed people vomiting,  
10 unconscious and in various states of mental distress;
- 11 • After the 2008 sweat lodge ceremony, participants observed people vomiting,  
12 unconscious and in various states of mental distress that necessitated their being  
13 dragged out of the sweat lodge;
- 14 • During the 2005 sweat lodge ceremony, Daniel Pfankuch was combative, delirious  
15 and eventually unconscious after he participated in Defendant's sweat lodge  
16 ceremony. Mr. Pfankuch was admitted for syncope, diagnosed with syncope and  
17 heat exposure and dehydration, treated with oxygen and an IV, and discharged  
18 from the emergency room with Heat Exhaustion instructions.
- 19 • As discussed on the record, the jury has been presented with evidence of a pattern  
20 involving the physical effects on participants of sweat lodges run by defendant and  
21 sweat lodges run by people other than defendant. The above observations were  
22 only present when Defendant conducted the sweat lodge. This was true regardless  
23 of the number of participants in the sweat lodge and whether the sweat lodge was  
24

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25 <sup>1</sup> At his 6 January 2011 interview, Dr. Mosely indicated he recalled that possibly during a pre-charging  
26 presentation at the County Attorney's Office, he recalled being presented with some information about people  
suffering from hyperthermia or heat stroke after the 2005 sweat lodge. Mosely also said in that interview that he had  
a vague recollection of being told about 20 participants getting sick in 2008, but he did not remember for sure. At  
that same January interview, Dr. Mosely also indicated he did not remember being told anything about Mr. Pfankuch.

1 essentially the same structure in 2008 or different structures in 2005 and 2007.

2 Had Ms. Do presented the above set of facts that have been testified to at trial, his opinion  
3 might have been very different.<sup>2</sup>

4 Moreover, Dr. Mosley's response conflicts with that of Dr. Lyon in his January 7, 2011  
5 interview when he was questioned regarding the PowerPoint presentation:

6 LI: Okay. Fair enough. Do, do, do you ... is this a relevant fact to you that,  
7 that a prior incident in 2005 resulted in a person, Dan Pfankuch, being diagnosed  
8 with heat stroke and dehydration?

9 LYON: Yes.

10 \*\*\*

11 LI: Okay? You see where it's ... the next line is 2008, new lodge was  
12 filled, twenty participants go sick.

13 LYON: Correct.

14 Li. Okay. Is that, was that also a relevant fact for you in forming your  
15 conclusions as to the cause and manner of death?

16 LYON": Yes.

17 *Exhibit A*, Interview of Dr. Lyon, 1/7/11 at 9:10-13; 23-28.

18 During trial the State was not allowed to question Dr. Lyon regarding the above  
19 statements even though they referred to facts he had considered in forming his opinion. Now the  
20 Defense seeks to have this Court preclude relevant and material evidence that at least one medical  
21 expert has indicated relevant in forming his conclusion regarding the cause of death based on two  
22

23  
24  
25 <sup>2</sup> The purpose of the interview was to allow the defense to question Dr. Mosley about any  
26 additional items he might have reviewed since his previous interview, and not to question him  
regarding the 404(b) issue. Since Dr. Mosley indicated he had only reviewed Lizbeth Neuman's  
records and nothing else, the State did not ask any follow-up questions.

1 questions posed during an interview without any foundation at all. Without the proper foundation,  
2 Dr. Mosley's opinion about the use of Mr. Pfankuch's prior experience lacks foundation and is  
3 not reliable.

4 **II. Whether or not Dr. Mosley would have considered Mr. Pfankuch's medical**  
5 **condition relevant to his determination of Lizbeth Neuman's death is not determinative of**  
6 **the issue before this Court.**

7  
8 At issue before this Court is whether or not *Defendant's actions caused* the deaths of  
9 Lizbeth Neuman, Kirby Brown and James Shore. It is the State's duty to present its case to the  
10 jury and have the jury decide this issue. As set forth in the State's previous response, evidence of  
11 the prior sweat lodges is relevant to the ultimate determination of this issue because it is only in  
12 the sweat lodge ceremonies conducted by Defendant as part of the extremely physically and  
13 mentally challenging Spiritual Warrior events, that anyone exhibits any signs of any distress. The  
14 Court previously ruled that a precondition for admission of testimony about physical ailments  
15 suffered by prior participants was the State must provide expert medical testimony that the signs  
16 and symptoms observed at the prior events were consistent with the signs and symptoms of heat-  
17 related illnesses. The State has met this burden through the testimony of several medical doctors.

18  
19 The Court never required, as argued in defendant's pleadings, that the State had to  
20 establish that the medical examiners believed the information relating to the mental and physical  
21 symptoms experienced by the prior sweat lodge participants were relevant to their determination  
22 as to the physical cause of death of the victims. However, at least one of the medical examiners,  
23 Dr. Lyon, indicated he did find this information relevant.

24  
25 The defense is asking this Court to preclude extremely relevant information relating to  
26 causation to be excluded based on the very limited and very leading questioning of one medical

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1 witness. This should not be allowed.

2 RESPECTFULLY submitted this 21<sup>st</sup> day of April, 2011.

4 SHEILA SULLIVAN POLK  
5 YAVAPAI COUNTY ATTORNEY

6 By 

7 BILL R. HUGHES  
8 DEPUTY COUNTY ATTORNEY

9 COPIES of the foregoing **hand delivered**  
10 this 21<sup>st</sup> day of April, 2011:

11 Hon. Warren Darrow  
12 Judge of the Superior Court

13 COPIES of the foregoing **Faxed**  
14 this 21<sup>st</sup> day of April, 2011:

15 Thomas Kelly

16 By: 

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SUPERIOR COURT OF STATE OF ARIZONA  
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

**TRANSCRIPT OF INTERVIEW**

Witness: Dr. Lyon

By: Luis Li and Miriam Seifter

Date: 01-7-11

Length: 29:10

1 heat stroke and dehydration?

2 LYON: Okay.

3 LI: Do you see that?

4 LYON: Yes.

5 LI: Do you remember that you were told that?

6 LYON: No I don't remember if I was told that. I don't even know if I was in on  
7 the meeting at that point.

8 LI: Well fair enough. But do you remember seeing it on the PowerPoint?

9 LYON: No, but I'm sure I looked at it.

10 LI: Okay. Fair enough. Do, do, do you ... is this a relevant fact to you that,  
11 that a prior incident in 2005 resulted in a person, Dan Pfankuch, being  
12 diagnosed with heat stroke and dehydration?

13 LYON: Yes.

14 LI: Okay. I'm gonna flip you to the front of the chart, which is at ... really,  
15 let's see, it's probably one, two, three, four, five pages in. It's just the  
16 introduction.

17 HUGHES: Luis, what's the bates number on that?

18 LI: Sorry. 4898.

19 HUGHES: Okay thank you.

20 LI: No worries. It starts with introduction, 2007, J.R. complained the lodge  
21 did not get hot enough.

22 LYON: Okay.

23 LI: Okay? You see where it's ... the next line is 2008, new lodge was filled,  
24 twenty participants got sick.

25 LYON: Correct.

26 LI: Okay. Is that, was that also a relevant fact for you in forming your  
27 conclusions as to the cause and manner of death?

28 LYON: Yes.